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No. 77-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI

and

RAY MARSHALL, Secretary of Labor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT SADLOWSKI

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This brief is filed by Respondent Sadlowski in response to the Memorandum on Behalf of the Secretary of Labor, recently filed by the Solicitor General.

The Solicitor General urges this Court to grant the Petition for Certiorari filed by the petitioner United

Steelworkers of America and to reverse the decision below. The Solicitor General contends that the decision of the Third Circuit authorizing an award of attorneys' fees to an intervenor in Title IV proceedings is in error because (1) it "significantly impedes the effective enforcement of Title IV"; and (2) is inconsistent with the law. These arguments are without merit.

I. The Availability Of Attorneys' Fees To A Successful Intervenor Does Not Impede The Secretary Of Labor's Enforcement Of Title IV.

The Solicitor General argues that the availability of fees impedes Title IV enforcement because it encourages intervention in suits brought by the Secretary of Labor and discourages the union from settling such suits.

A. The argument that intervention will be encouraged is nothing more than a make-weight. The decision to intervene, as it true of most litigation decisions, is unlikely to be made on the basis of the availability of attorneys' fees. Intervention is sought in order to protect one's own interests, to assist the Secretary, and to protect the democratic processes of union elections. Most importantly, the decision below does not *guarantee* attorneys' fees to intervenors; it permits an award only if the intervenor can demonstrate that there is some equitable basis on which to base an award. Faced with such a burden, it is unlikely that the union member will seek to intervene merely because of the potential availability of fees.

The argument (Memorandum 4-5) that attorneys' fees will encourage intervention "at a stage when no further contribution to the lawsuit is useful" is belied

by the actual experience of the Department of Labor in Title IV litigation. In *Usery* v. *Local Union No. 639, Internat'l Broth. of Teamsters, Etc.*, 177 U.S. App. D.C. 222, 543 F.2d 369 (1976), *cert. denied sub nom. Local Union 639* v. *Marshall*, 429 U.S. 1123 (1977), upon remand by the D. C. Circuit for determination of the amount of attorneys' fees, the Government (the Departments of Labor and Justice) advised the District Court that the intervenors there had rendered valuable assistance to the Labor Department in its successful prosecution of its Title IV action, both before and after the filing of the complaint.[1] No mention of any deleterious effect on the Department of Labor's enforcement authority was alluded to there, and the District Court (Hart. J.) specifically referred to the Government's views in awarding the fees in question.[2]

The Department of Labor's experience under a similar title of the LMRDA—Title III, 29 U.S.C. § 464(a), involving union trusteeships—also undercuts its claims here. Under Title III, both the Secretary of Labor and an individual union member may sue to challenge a union trusteeship. A union member may also intervene in the Secretary's Title III action. Attorneys' fees have been awarded to individual union members who brought suit under Title III, even where their action was essentially in support of a similar suit brought by the Secretary. *McDonald* v. *Oliver*, 525 F.2d 1217 (5th Cir. 1976). So far as we are aware, the Department of

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[1] The memorandum filed by the Government in the *Local 639, Teamsters* case is included as an Appendix to the "Supplemental Brief of Respondent Sadlowski," filed in this case on February 1, 1978.

[2] The District Court's order in the *Local 639, Teamsters* case is attached to this Brief as an Appendix.

Labor has not suggested that an award of fees in such Title III actions hampers its independent enforcement authority.

B. The Solicitor General argues (Memorandum 5-6) that if the union is subject to attorneys' fees litigation with intervenors, it will have a "substantial disincentive" (*Id.* at 5) to settle the case and, thereby, agree to a new election. The union will feel, in the Solicitor General's view, that since it must presumably litigate with an intervenor over fees, there is no reason to settle the election dispute with the Department of Labor.

The flaw in this argument is apparent. It assumes that the union will prefer to needlessly litigate the election claims (with the concomitant expenditure of funds for its own lawyers) solely because it faces possible future litigation with the intervenor over the latter's attorneys' fees. It is not surprising that the Solicitor General offers no empirical or historical evidence for this unsupported assertion. Indeed, one can argue just as plausibly, and perhaps more plausibly, that the availability of fees is just as likely to prompt the union to settle promptly rather than increase possible monetary exposure by litigating the election claims. Presumably, settlement, especially early settlement, will lessen the extent of the intervenor's contribution to the litigation and hence will reduce his allowable attorneys' fees.

II. An Award Of Attorneys' Fees Is Not Inconsistent With The LMRDA.

The Solicitor General recognizes that regardless of the strength of the argument that attorneys' fees would hamper enforcement, the decision below may only be reversed if it is inconsistent with prevailing law. Therefore, he argues that Title IV precludes an award of

fees. Both the court below and the D. C. Circuit in the *Local 639, Teamsters* case have rejected this contention. There is no legislative history (and the Solicitor General points to none) which supports this position. The decision of this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972) specifically rejected the argument (Memorandum 4) that the Secretary of Labor's "exclusive" power to institute an election challenge under Title IV forbade intervention and participation by interested union members. Contrary to the "public-private" dichotomy suggested by the Government (Memorandum 7), *Trbovich* recognized that intervenors under Title IV could provide assistance to the Secretary in protecting union democracy. 404 U.S. at 538-39. The Solicitor General now asks this Court to rule that the mere future possibility of attorneys' fees to an intervenor so hinders the Secretary that a congressional intent to preclude such an award must be found. Yet a ruling to that effect would effectively nullify the *Trbovich* right of intervention.

In sum, despite its disclaimer, the Government is now asking this Court to take away from the rank-and-file union members the effective exercise of the very right which the Court conferred on those same members in *Trbovich* over the same type of objections raised by the Government. Indeed, the failure to make fees available (upon a proper common benefit showing) might itself undermine enforcement of Title IV, since the Secretary's authority to sue under Title IV is dependent on the diligent legal efforts of the rank-and-file union member.[3]

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[3] *See, e.g.,* Supplemental Brief of Respondent Sadlowski, Appendix, p. 4a (filed February 1, 1978).

III. Review Of This Case Now Would Be Premature And Inappropriate.

The Solicitor General acknowledges (Memorandum 1-2) that the Secretary of Labor has declined heretofore to take a position in the district courts and courts of appeals on the issue of attorneys' fees in Title IV cases. Certainly, that is true in the instant case. Thus, no lower court has had the benefit of considering the view of the United States on this question—a view which was apparently announced only a few weeks ago.[4]

The Solicitor General is unable to specify why, in such circumstances, this case is the appropriate vehicle to decide this issue. The lower courts should be given the opportunity to examine these arguments of the Government in the first instance. This is especially true here, where there is no current conflict among the courts of appeals which have decided the issue. Both the D. C. Circuit in *Local 639, Teamsters, supra,* in which *certiorari* was denied, and the Third Circuit below have held that an award of fees to Title IV intervenors is permissible where a common benefit is shown.

The Government does not suggest that it will not have ample opportunity to present its views to the lower courts in these or other Title IV proceedings. Moreover, here, at the very least, it is clear that the potential availability of attorneys' fees did *not* prevent the Government from settling this Title IV suit

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[4] Letter of Solicitor of Labor, dated January 5, 1978, included in Petitioner's Supplemental Brief, p. 1a.

with the petitioner union. Until a conflict arises or the lower courts have been presented with the Government's arguments, the issue does not merit the attention of this busy Court.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, *Plaintiff*

and

DANIEL GEORGE and PHILLIP A. FEASTER,
Intervenor-Plaintiffs,

v.

LOCAL UNION No. 639, etc., *Defendant*

Civil Action No. 1963-72

Order

(filed August 4, 1977)

Upon consideration of Intervenor-Plaintiffs Amended and Supplemental Motion for an order awarding them legal fees, costs and suit money in the amount of $55,000 for 590.12 hours in services performed both before and after the disputed Union election of January 1972; Defendant Union's opposition in so far as Intervenor-Plaintiffs seek payment for hours logged prior to the January 1972 election and for efforts asserted by the Union to be duplicative of those expended by the Secretary of Labor, and seek payment in an amount in excess of $27,500; the Secretary of Labor's memorandum, submitted pursuant to the Court's request, suggesting that counsel for Intervenor-Plaintiffs had significantly assisted the Secretary in vindicating statutory rights; and the opposition of Frank C. DeBrouse and Robert A. Moore, who, as members of the Union sought,

and were granted, leave to intervene as defendants; and the Court having heard oral argument on open Court on July 29, 1977, and .

The Court finding that counsel for Intervenor-Plaintiffs had devoted more than 500 hours of their time on post-election matters in this action and various appeals therefrom, virtually all of which, other than that time devoted to seeking attorneys fees, was of considerable assistance to the Secretary and the Courts involved; the Court further finding that the time spent by Intervenor-Plaintiffs' counsel in seeking vindication of their claim to an attorneys fee is compensible by the Union; the Court having considered the qualifications of counsel, the nature and quality of work performed by them and other pertinent factors, consideration of which is prescribed by decisions of the Court of Appeals for this Circuit;[1] the Court having considered the normal charges in the legal community for similar work; the fact that principal counsel for Intervenor-Plaintiffs in this case was outstanding in his representation of Intervenor-Plaintiffs; that counsel vindicated important rights of Union members, *i.e.*, the right to free and fair union elections and administration, and that they succeeded in establishing significant new principles of labor law; and

The Court having concluded that the contribution of counsel for Intervenor-Plaintiffs was of substantial benefit to others in addition to Plaintiff-Intervenors, and that compensation at the rate of $50 per hour plus a nominal "multiplier" as recommended by the Union would be inadequate in light of all the circumstances, it is, by the Court this 3rd day of August 1977

ORDERED, that Intervenor-Plaintiffs be, and they hereby are, awarded legal fees, costs and suit money in the amount

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[1] *National Treasury Employees Union* v. *Nixon*, 172 U.S.App.D.C. 217, 222-23, 521 F.2d 317, 322-23 (1975); *Pete* v. *UMWAWRF*, 171 U.S.App.D.C. 1, 16, 517 F.2d 1275, 1290 (1975).

of Thirty-Five Thousand Dollars ($35,000.00) as a fair and reasonable amount for post-election services rendered; said amount to be paid over to counsel of record for Intervenor-Plaintiffs by Defendant Local Uinon 639 on or before October 15, 1977 or at such other time or times as may be agreed upon.

/s/ GEORGE L. HART, Jr.,

George L. Hart, Jr.,
United States District Judge